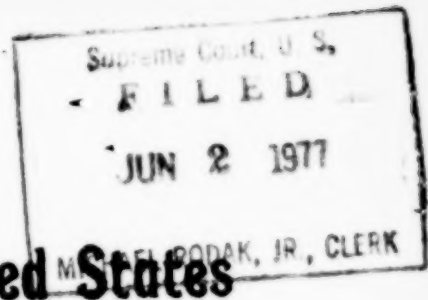


IN THE  
**Supreme Court of the United States**



October Term, 1976.

**No. 76-1529.**

H. N. SPENCER, M.D.,

*Petitioner,*

*v.*

HANNA M. AYOUB and MARGARET AYOUB, His Wife,  
*Respondents.*

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit.

**BRIEF FOR RESPONDENTS IN OPPOSITION.**

S. GERALD LITVIN,  
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CHARLES G. YOUNG, III,  
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HANNA M. AYOUB and MARGARET AYOUB, His Wife,  
*Respondents.*  
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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT.  
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BRIEF FOR RESPONDENTS IN OPPOSITION.  
—

CITATION OF OPINION BELOW.

The Opinion of the Court of Appeals, Hanna M. Ayoub and Margaret Ayoub, his wife, Appellants, vs. H. N. Spencer, M.D., Appellee, is reported at 550 F. 2d 164 (3rd Cir. 1977). The Opinion of the District Court, Hanna M. Ayoub and Margaret Ayoub, his wife, Plaintiffs, vs. H. N. Spencer, M.D., Defendant, is reported at 407 F. Supp. 354 (E. D. Pa. 1976).

**JURISDICTION.**

Petitioner's statement of the jurisdiction of this Court is accurate with the exception of the date on which the Judgment of the Court of Appeals was entered, which was February 18, 1977.

**QUESTIONS PRESENTED FOR REVIEW.**

The Petition misstates the legal issues presented. The issues are:

1. Whether there is any real controversy presented to this Court, in view of the petitioner's request that this Court review only one of three grounds on which the Court of Appeals based its decision to order a new trial.

2. Whether there is a justiciable issue involving Federal Rule of Civil Procedure 51 in view of respondents' specific objection to the District Court's jury charge.

3. Whether the application of the fundamental error doctrine is in conflict among the circuits so as to warrant the granting of a writ of certiorari.

**FEDERAL RULE OF CIVIL PROCEDURE INVOLVED.**

The Federal Rule of Civil Procedure involved is adequately set forth in the Petition.

**COUNTER-STATEMENT OF THE CASE.**

Petitioner's statement of the case contains several inaccuracies and omissions of the facts adduced at trial. Therefore, respondents are compelled to file this counter-statement.

This medical malpractice action, seeking monetary damages for permanent paraplegia to Hanna M. Ayoub, was tried before a jury on the issue of liability.<sup>1</sup>

On August 10, 1972, respondent, age 43 and the father of eight children, became paralyzed while on his way to see a neurosurgeon. He will never walk again (Tr.<sup>2</sup> 2-47, 2-48). Mr. Ayoub was taken to Lankenau Hospital outside Philadelphia where Dr. Richter, a neurosurgeon (who testified as respondents' expert witness at trial) performed an operation which confirmed that Mr. Ayoub's paralysis was the result of a ruptured, herniated thoracic disc at the T-7-8 level.<sup>3</sup>

Nine months earlier, on November 5, 1971, Mr. Ayoub had fallen at work injuring his back (Tr. 2-9). When Mr. Ayoub's condition did not improve after more than a month, the workmen's compensation carrier sent him to petitioner, an orthopedic specialist, on December 14, 1971. In the opinion of all the medical experts who testified, Mr. Ayoub's complaints to petitioner were classic symptoms of a herniated thoracic disc (Tr. 1-39, 1-40, 3-68, 3-71, 3-72, 5-18, 6-44, 6-120, 6-176 through 6-180). Petitioner's examination of Mr. Ayoub on December 14, 1971 lasted only

1. Petitioner's petition for writ of certiorari failed to state the basis for federal jurisdiction as required by U. S. Sup. Ct. Rule 23.1(g), 28 U. S. C. As Mr. Ayoub was a citizen of Jordan and petitioner a citizen and resident of Pennsylvania, jurisdiction was based upon 28 U. S. C. § 1332.

2. "Tr." refers to the transcript of the proceedings in the District Court.

3. The thoracic area of the spine is formed by the 12 dorsal vertebrae and the 12 paired ribs.

15 minutes and did not include a thorough neurologic examination. Petitioner's diagnoses were an acute sprain in the thoracic and lumbar back areas and degenerative disc disease at T-7-8 level (Tr. 1-24, 1-25, 5-106, 5-134). Petitioner prescribed a back brace and told respondent that the problem was only muscular (Tr. 2-22, 2-23, 2-143). A second appointment was scheduled for December 27. At that time, even though respondent's condition had not improved, petitioner limited his examination to a determination that the back brace fit properly. Respondent testified that petitioner did not schedule a third appointment and, in fact, told respondent that he should be able to return to work on January 15, 1972.<sup>4</sup> Petitioner testified that a third appointment was scheduled but not kept.

On January 15, 1972, respondent returned to work and, with the aid of pain medication prescribed by petitioner, was able to work part-time until shortly before he became paralyzed.

At trial, respondents' medical expert testified that petitioner was negligent on two grounds. First, that petitioner failed to perform a proper and adequate examination in December 1971. A full examination would have disclosed that respondent had a herniated thoracic disc at T-7-8 level. The second ground was petitioner's failure to provide and schedule further follow-up care (Tr. 3-46, 3-60). This malpractice resulted in the herniated disc rupturing nine months later causing respondent's paralysis.<sup>5</sup>

4. Furthermore, on December 29, petitioner wrote the compensation carrier stating, in part, that: "I would estimate he should be able to return to work approximately the 15th of January." In that report petitioner made no suggestion to the insurance company that he expected to see respondent again (Pl. Ex. 1; Tr. 1-20, 1-21).

5. Without detailing all of the medical testimony, all of the medical experts acknowledged that thoracic disc problems are much more dangerous than cervical or lumbar disc problems since rupture will always cause spinal cord insult. Therefore, early diagnosis is

In his closing argument to the jury, petitioner's counsel attacked respondents' credibility by referring to the contents of a document not in evidence. Respondents' counsel made an immediate objection to those comments. In ruling on the objection, the District Court only compounded the prejudicial effect of the remarks by petitioner's counsel (Tr. 7-121, 7-122, A10-11).

After the Court's charge to the jury, respondents' counsel objected to that portion of the charge dealing with contributory negligence generally and particularly as being confusing and misleading and as improperly intertwining the concepts of proximate cause with contributory negligence.<sup>6</sup> The District Court acknowledged that respondents' counsel clearly objected to that portion of the charge which inextricably intertwined the principles of contributory negligence and proximate cause (A15', Tr. 8-40, 8-47).

The Court of Appeals based its reversal of the judgment of the District Court on three grounds:

1. That portion of the District Court's jury charge, to which respondents' counsel objected, may have misled the jury "into believing that if Mr. Ayoub's failure to seek further medical treatment con-

5. (Cont'd.)

terribly important and close monitoring of the patient absolutely necessary, since the chances of efficacious surgery are lost if rupture occurs before surgery (Tr. 3-69, 3-70, 5-37, 6-131, 6-133).

6. "But I want to specifically note, Your Honor, that in addition to charging the jury on contributory negligence, you brought it in in terms of whether or not there was proximate cause. In discussing proximate cause, *in addition to what I have already stated*, it was in connection with whether or not there was proximate cause that you discussed the question of contributory negligence, and I really think that that is misleading and confusing." (Emphasis supplied) (Tr. 47)

7. "A" refers to the Appendix attached to the Petition for a Writ of Certiorari.

tributed to his injury, then he was barred from recovery without regard for the reasonableness of his conduct" (A6).

2. Failure of the District Court to relate the parties' contentions to the law of contributory negligence constituted fundamental error requiring reversal (A7-8).

3. Petitioner's counsel's reference in closing argument to a document not in evidence constituted reversible error (A10-11).

### REASONS FOR DENYING THE WRIT.

There are three basic reasons why this case is entirely inappropriate for the granting of a writ of certiorari.

1. The Court of Appeals held there were three grounds for reversing the judgment of the District Court and ordering a new trial. The petitioner herein seeks to have this Court review only one of those grounds so that a decision on that ground cannot affect the result reached by the Court of Appeals—that a new trial must be held. It would not be fruitful for this Court to grant a writ of certiorari to consider an issue which cannot affect the outcome of the case.

2. Petitioner alleges that respondents' counsel failed to object to that portion of the District Court's jury charge which the Court of Appeals found was reversible error and seeks to argue that there should be no fundamental error doctrine permitting a court to review the District Court's jury charge when there was no objection to the jury charge during the trial. Petitioner's premise is entirely inaccurate. Respondents clearly objected to that portion of the charge in which the District Court intertwined the issues of proximate cause and contributory negligence and the District Court in its Opinion acknowledged that this objection was adequately raised (A15). It was this intertwining of issues in the charge which was one of the reasons the Court of Appeals found it was necessary to reverse the judgment of the District Court and to order a new trial.<sup>8</sup> Because the objection to the jury

8. It is possible that the Court of Appeals applied the fundamental error doctrine to another defect in the jury charge—i.e., the District Court's failure to relate the parties' contention to the law. However, the Court of Appeals' Opinion unmistakably bases its first ground for reversal upon that portion of the jury charge which was specifically objected to by respondents' counsel. See A3-7.

charge was communicated to the District Court Judge before the jury retired, it would be inappropriate for this Court to consider the application of the "fundamental error" doctrine in this case. The "fundamental error" doctrine as it relates to Federal Rule of Civil Procedure 51 is only pertinent when no objection was made to that portion of the jury charge under attack.

3. There is no conflict among the circuits in the application of the "fundamental error" doctrine. While various circuits have chosen to label the doctrine differently—e.g., fundamental or plain error, in the interest of justice, fundamental and highly prejudicial, inconsistent with substantial justice, etc.—these different labels all refer to the general principle that an error in the jury instructions will be corrected on appeal despite counsel's failure to object at trial where the harm to one of the parties and the resulting injustice outweigh the interest in motivating counsel to make timely objections.

**I. Because Petitioner Challenges Only One of Three Grounds for the Court of Appeals' Reversal of the Judgment of the District Court, It Would Be Inappropriate to Grant a Writ of Certiorari.**

Petitioner asks this Court to grant the writ to reverse the Court of Appeals alleging that the District Court's charge was not objected to. Petitioner fails to acknowledge that the Court of Appeals found three grounds for reversing the judgment and ordering a new trial. As to two of those grounds—i.e., the confusion created by intertwining concepts of contributory negligence with proximate cause and petitioner's counsel's referring to documents not in evidence—timely objections were made by respondents' counsel and the District Court acknowledged

that these objections had been made.<sup>9</sup> Because only one of these three grounds is being attacked by petitioner, the petition for writ of certiorari should be denied.

One of the basic prerequisites to the granting of a petition for certiorari is that the resolution of the controversy sought to be decided on certiorari will affect the outcome of the case. In *The Monrosa v. Carbon Black Export, Inc.*, 359 U. S. 180, 79 S. Ct. 710 (1959), the Court dismissed the writ of certiorari as having been granted improvidently when it became clear that the decision of the Court of Appeals could have been sustained on grounds which were not the basis for the grant of certiorari. The Court refused to consider the allegedly certioriable point because its resolution would have been superfluous in the context of the case.<sup>10</sup>

The Court in *Monrosa* announced that:

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue allegedly in conflict among the circuits] can await a day when the issue is posed less abstractly." 359 U. S. at 184, 79 S. Ct. at 713.

9. A15 and A21.

10. In *Piccirillo v. New York*, 400 U. S. 548, 91 S. Ct. 520 (1971), this Court dismissed a writ of certiorari as improvidently granted when it became apparent that the determination of the issue on certiorari would be unnecessary to resolution of the case. 450 U. S. at 459, 91 S. Ct. at 521. See also, *Flournoy v. Wiener*, 321 U. S. 253, 261-262, 64 S. Ct. 548, 552-553 (1944); *Cook v. Hudson*, 97 S. Ct. 543 (1977); Stern and Gressman, *Supreme Court Practice*, p. 127 (3rd Ed. 1962).

Similarly, even were petitioner in the instant case to prevail on the one issue he raises, respondents would still be entitled to a new trial on the grounds not challenged in the petition.<sup>11</sup> In effect, petitioner seeks an advisory opinion and this Court should refuse petitioner's invitation to engage in the futile exercise of reviewing a question which will have no effect on the outcome of this case. Cf., *Dandridge v. Williams*, 397 U. S. 471, 475, 90 S. Ct. 1153, 1156, n. 6 (1970).

Because the Court of Appeals recognized three grounds compelling a reversal of the District Court's Judgment, this Court should refuse to accept petitioner's request to have one of those grounds reviewed.

## **II. Federal Rule of Civil Procedure 51 Is Not Here in Issue Because Respondents Did Specifically Object to the District Court's Jury Charge.**

In its instructions, the District Court invited the jury to find Mr. Ayoub guilty of contributory negligence without instructing the jury that in order to so conclude they would have to find that he acted unreasonably. See A3-7. Respondents' counsel objected that this intermingling of the concepts of proximate cause with contributory negligence to a lay jury was misleading and confusing; the District Court Judge acknowledged that respondents had adequately expressed this objection even though he disagreed that the charge was erroneous (A15).

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11. The grounds for reversal announced by the Court of Appeals which are not the subject of petitioner's attack should not be considered by this Court; accordingly even were the writ to be granted the granting of a new trial by the Court of Appeals would still be final. U. S. Sup. Ct. Rule 23.1(c), 28 U. S. C. See, *Irvine v. People of State of California*, 347 U. S. 128, 129-130, 74 S. Ct. 381 (1954); *Local 1976, etc. v. National Labor Rel. Board*, 357 U. S. 93, 96, n. 1, 78 S. Ct. 1011, 1014 (1958).

The Court of Appeals agreed that by intermingling concepts of contributory negligence with proximate cause, the District Court had erroneously suggested that a finding of causation, without a finding of unreasonable conduct, would warrant the jury's concluding that Mr. Ayoub had been contributorily negligent. The Court of Appeals went on to examine the whole charge and concluded that the issues of contributory negligence and proximate cause were so intertwined in the instructions that a proper understanding of the separate questions for determination was highly unlikely (A6-7). After finding that the intertwining was fraught with confusion, the Court of Appeals also found that the District Court should have related the parties' contentions to the law of contributory negligence (A7-8). It was only in discussing this additional ground for reversal (the failure to relate the parties' contentions to the law) that the Court of Appeals referred to the fundamental error doctrine.<sup>12</sup> The Opinion of the Court of Appeals clearly acknowledged that the improper intermingling of the concepts of contributory negligence and proximate cause was the subject of respondents' objection at trial. The fundamental error doctrine therefore played no role in the Court of Appeals' ruling on that issue.

In view of the respondents' counsel's specific objection to the jury instruction and the District Court's acknowledgement of that objection, this case certainly does not present a controversy involving the failure of a party to make an objection to the jury instructions.

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12. Because respondents objected to the District Court's instructions intertwining contributory negligence with proximate cause, the appellate court was entitled to review the District Court's failure to relate the parties' contentions to the law of contributory negligence. An appellate court is entitled to consider all grounds for reversal related to the underlying objection. See, *Anderson v. United States*, 417 U. S. 211, 215-218, 94 S. Ct. 2253, 2258-2259, n. 5, (1974); *Otten v. Stonewall Insurance Company*, 511 F. 2d 143, 146 (8th Cir. 1975).

### III. There Is No Conflict Among the Circuits Concerning the Application of the Fundamental Error Doctrine.

Petitioner alleges that the appellate court's reversal based upon fundamental error<sup>13</sup> is contrary to Rule 51 of the Federal Rules of Civil Procedure, and that application of the fundamental error principle varies among the circuits to such an extent that certiorari should be granted to resolve the conflicts. A review of the case law belies the existence of a conflict.

In *United States v. Atkinson*, 297 U. S. 157, 56 S. Ct. 391 (1936), this Court reaffirmed the proposition that "appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." 297 U. S. at 160-3. The proposition that appellate courts may examine substantial and serious errors in the absence of an objection at trial has been reaffirmed time and again by this Court. See, *Anderson v. United States*, 417 U. S. 211, 215-218, 94 S. Ct. 2253, 2258-2259, n. 5 (1974).

The appellate cases petitioner cites do not support petitioner's contention that conflicts exist among the circuits. An examination of those cases demonstrates that Rule 51 has been uniformly applied and there is no confusion in its application. In fact, those cases fall neatly into line and confirm the proposition that appellate courts consistently consider an error in the jury instruction which was not objected to at trial if the error is apparent on the face of the record and it would be a miscarriage of justice to

13. The Third Circuit Court of Appeals found fundamental error in the District Court's failure to relate the parties' contentions to the law of contributory negligence (A7-8).

leave the error uncorrected.<sup>14</sup> See, e.g., *Ind. Dev. Bd. of Section, Ala. v. Fuqua Industries*, 523 F. 2d 1226 (5th Cir. 1976); *Williams v. City of New York*, 508 F. 2d 356 (2nd Cir. 1974); *Celanese Corp. of America v. Vandalia Warehouse Corp.*, 424 F. 2d 1176 (7th Cir. 1970); *Pritchard v. Liggett and Myers Tobacco Company*, 350 F. 2d 479 (3rd Cir. 1965); *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96 (3rd Cir. 1960); 5A Moore's Federal Practice ¶ 51.04, pp. 2507-2515 (1975).

The Courts also agree that where the error in an instruction is corrected elsewhere in the charge, or merely represents an embellishment on a more fundamental issue which was properly presented, or if it clearly had no effect on the outcome, the error will not warrant reversal absent an objection. See, e.g., *Morrissey v. National Maritime Union of America*, 544 F. 2d 19 (2nd Cir. 1976); *Cicinato v. McPheeters*, 542 F. 2d 634 (4th Cir. 1976); *Hoffman v. Sterling Drug, Inc.*, 485 F. 2d 132 (3rd Cir. 1973); *Lewis v. Stickland Truck Lines*, 505 F. 2d 164 (6th Cir. 1974); *Trent v. Atlantic City Electric*, 334 F. 2d 847 (3rd Cir. 1964).

While some circuits have applied different labels to the fundamental error doctrine—e.g., plain error, in the interest of justice, inconsistent with substantial justice—the explanation of the standard and the manner in which it is applied to the facts of the cases is remarkably similar from circuit to circuit.<sup>15</sup> In fact, cases from one circuit are fre-

14. After reviewing 118 decisions regarding Federal Rule of Civil Procedure 51, Mr. Justice Frankfurter announced he was convinced there was no conflict or confusion among the circuits in the application of Rule 51. *Gibson v. Lockheed Aircraft Service*, 350 U. S. 356, 76 S. Ct. 366 (1956) (concurring opinion). No crevice in this uniformity has opened since that time.

15. Petitioner's reliance on an alleged conflict within the Third Circuit concerning Rule 51 is not well taken. The Third Circuit has applied the fundamental error test uniformly. See, e.g., *Herman v. Hess Oil Virgin Islands Corp.*, 524 F. 2d 767 (3rd Cir. 1975);

quently cited by other circuits for the statement of the proposition. See, *Morris v. Travisono*, 528 F. 2d 856 (1st Cir. 1976); *Ind. Dev. Bd. of Section, Ala. v. Fuqua Industries*, 523 F. 2d 1226 (5th Cir. 1976); *Cohen v. Franchard Corp.*, 478 F. 2d 115, 124 (2nd Cir. 1973); *Arteiro v. Coca Cola Bottling, Midwest, Inc.*, 47 F. R. D. 186 (D. Minn. 1969).

Accordingly, a review of the case law does not reflect a "real and embarrassing conflict" necessitating this Court's intervention. On the contrary, it is clear that the Courts have uniformly interpreted Rule 51 and have applied the "fundamental error" doctrine consistently in those cases in which substantial justice required that the courts excuse counsel's omission in order to protect the parties and the system of justice.

15. (Cont'd.)

*Pritchard v. Liggett and Myers Tobacco Company*, 350 F. 2d 479 (3rd Cir. 1965); *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96 (3rd Cir. 1960). Furthermore, as this Court announced in another context, "it is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U. S. 901, 902, 77 S. Ct. 633 (1957). And as Justice Harlan said:

"... contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."

*Manning the Dikes*, 13 Record of N. Y. C. B. A. 541, 552 (1958).

Petitioner's reference to state court cases involving Pennsylvania state court procedure with respect to objections to instructions is totally inappropriate. Federal courts are neither bound nor guided by state procedural rules on the method or effect of objection to jury instructions. See, e.g., *Chavez v. Sears, Roebuck & Co.*, 525 F. 2d 827 (10th Cir. 1975); *Seltzer v. Chesley*, 512 F. 2d 1030 (9th Cir. 1975); *Batesole v. Stratford*, 505 F. 2d 804 (6th Cir. 1974); *Hopkins v. Metcalf*, 435 F. 2d 123 (10th Cir. 1970); 9 Federal Practice and Procedure, Wright and Miller § 2555, p. 651.

### CONCLUSION.

Two of the three grounds for reversal of the District Court's Judgment were the subject of objections by respondents' counsel during the trial. The objection to the District Court's charge intertwining concepts of contributory negligence with proximate cause and the objection to petitioner's improper reference to documents not in evidence were sufficiently specific for the District Court to acknowledge the objections. Because those grounds for reversal cannot properly involve the application of Federal Rule of Civil Procedure 51 and the fundamental error doctrine, a review by this Court of that doctrine would not affect the result in this case. Furthermore, there is no conflict among the circuits concerning the application of the fundamental error doctrine. Accordingly, this case is not an appropriate one for the grant of the writ of certiorari.

Respectfully submitted,

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